

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty
Order Issued to Quad State Asbestos
Removal, Inc., P.O. Box 95,
122 North Fifth Street, Montevideo,
Minnesota 56265.

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION,
AND MEMORANDUM.

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The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, assisted by Kathleen D. Sheehy, Administrative Law Judge, on May 4, 1995, in St. Paul. The hearing took only part of the day, and the record closed at the end of the hearing.

Appearing on behalf of Quad State Asbestos Removal, Inc., was its president, Loren Bogan, pro se.

Appearing on behalf of the Minnesota Pollution Control Agency staff was Adonis Neblett, Assistant Attorney General.

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 116.072, subd. 6(e), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. Within those five days, parties may comment to the Commissioner on the recommendations, and the Commissioner must consider the comments in making his final decision. Parties should contact Adonis Neblett to ascertain the procedure for filing exceptions or presenting argument. The final Order may be appealed in the manner provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUE

Should the Administrative Penalty Order, assessing a \$7,750 nonforgivable penalty against Quad State Asbestos Removal, Inc., be affirmed?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background Facts

1. Quad State Asbestos Removal, Inc. is a corporation located in Montevideo, Minnesota. It is owned and operated by Loren Bogan, its president.

2. On May 16, 1994, the MPCA received a timely Notice of Intent to Perform a Demolition or an Asbestos Abatement Project from Quad State Asbestos Removal, Inc. The Notice indicated that the Company had contracted with the Granite Falls High School, 450 Ninth Avenue, Granite Falls, Minnesota, to remove approximately 7,308 square feet of asbestos-containing material (6,984 square feet of floor tile and mastic, and 324 square feet of ceiling tile) on the second floor of the high school. The Notice further provided that the asbestos-containing material would be removed between June 8, 1994 and June 14, 1994.

3. On June 9, 1994, Jeffrey T. Connell and Rhonda Johaneson of the MPCA inspected the asbestos-removal site at Granite Falls High School. When they arrived shortly before noon, school employees and students were present on the first floor, although classes had ended for the summer. On the second floor, where the work was being done, most of the Quad State employees were showering and changing so they could leave for a lunch break. Quad State president Loren Bogan was not present; site supervisor Fred Wellnitz was outside the containment area; and employee Michael Longworth had been working inside the containment area with two new employees.

4. After meeting with site supervisor Fred Wellnitz, Jeff Connell suited up and entered the containment area.

5. After entering the containment area, Connell observed that all of the ceiling tile had been removed and placed in bags on the floor. Approximately half of the bags were open, and half were sealed with duct tape. Connell determined that all of the tile in the open bags was dry. He then opened several of the sealed bags and determined that the tile in the sealed bags was also dry. He found dust in the inspected bags and saw no beads of water or other evidence of water in the bottom of any of the bags.

6. Connell informed site supervisor Fred Wellnitz that the tile was dry, and Wellnitz acknowledged that the material was not adequately wet. Wellnitz immediately directed another Quad State employee to wet the material in all of the bags.

7. Wellnitz explained to Connell that there were new employees involved, and that they did not know when they were supposed to wet down the material.

8. Connell took three samples of the ceiling tile and took photographs of the containment area reflecting dust in the bags. The sample ceiling tiles were sent to Braun Intertec Corp., Minneapolis, Minnesota, for analysis of their asbestos content.

9. The day of the inspection Johaneson completed an MPCA Demolition and Renovation Checklist noting that asbestos-containing materials were not kept adequately wet until collected and contained and that asbestos-containing materials in bags were not adequately wet. Ex. 3. The MPCA staff members informed Wellnitz that the MPCA Air Quality Division enforcement committee would make a decision regarding any enforcement action resulting from the two violations found.

10. On June 20, 1994, Braun Intertec Corp. notified the MPCA that the three sample ceiling tiles contained between 10 to 12 percent amosite asbestos and 1 to 2 percent chrysotile asbestos.

11. The Company does not dispute that the two violations occurred as described above.

Procedural History of Administrative Penalty Order

12. In July 1994 MPCA staff met with the Air Quality Division enforcement committee to determine the appropriate penalty. The committee determined that it was justified in issuing an administrative penalty order assessing a \$7,750 nonforgivable penalty and requiring the Company to take the following corrective actions: (1) submit a plan, subject to MPCA approval, of the procedures the Company will implement to ensure that all future asbestos abatement jobs adhere to 40 C.F.R. 61.145, 40 C.F.R. 61.150, and Minn. Rules pt. 7011.9920, specifically addressing the actions the Company will take to ensure proper wetting methods are used; and (2) submit a written summary describing what procedures were taken by the Company to correct the violations within the enclosure at the [Granite Falls High School] facility.

13. On August 18, 1994, the MPCA wrote to Loren Bogan informing him of the facts underlying the two violations found during the June 9 inspection and requesting that Bogan respond within ten days if he believed any of these facts were incorrect.

14. On August 29, 1994 the MPCA received Bogan's response. Ex. 11. Bogan did not refute the violations but stated essentially that employee Michael Longworth misted the tile during the removal process and intended to put water in the bags after lunch.

15. On September 16, 1994 the MPCA sent to Bogan an Administrative Penalty Order issued to Quad State Asbestos Removal, Inc. After the Order was issued, Rhonda Johaneson contacted Bogan by telephone to explain the terms of the Order and his right to appeal. During this conversation Johaneson and Bogan decided to have an informal meeting, for which Johaneson drove to Montevideo. During the meeting Bogan stated that the Company was not able to pay the penalty. Johaneson requested that he provide information regarding the Company's financial status.

16. On October 17, 1994, the MPCA received the Company's request for a hearing. Bogan maintained that the fine was unduly harsh considering it was Quad State's first violation and that the fine would be a financial hardship.

17. On November 23, 1994, the MPCA received Quad State's unaudited balance sheets and statements of operations for the years ending 1992 and 1993. Although Quad State had net income of \$50,874.89 in 1992, it had a net loss of about \$18,000 in 1993. After various adjustments for non-cash expenses, Quad State had a positive cash flow of only \$4,000 in 1993.

18. Toward the end of 1994 the MPCA held another meeting with Bogan to discuss the financial information Bogan had provided, and in this meeting the agency offered a payment schedule instead of requiring a lump-sum payment. The MPCA decided to delay the hearing in order to obtain 1994 financial information about the Company.

19. On February 21, 1995, the MPCA received Quad State's unaudited balance sheets and statements of operations for the years ending 1993 and 1994. In 1994 Quad State had net income of \$24,218.31 and, after adjustment for non-cash expenses, a positive cash flow of \$48,898.

20. On March 16, 1995, Rhonda Johaneson had a telephone conversation with Bogan in which she advised him that the financial records indicated the Company was able to pay the penalty originally assessed and that the MPCA would not adjust the penalty amount based on his claim of financial hardship. In this conversation Bogan stated that he wanted to proceed with his appeal of the Order.

21. The Company has not paid the penalty or taken either of the corrective actions required by the Order.

Calculation of the Penalty

22. The MPCA has developed a thorough evaluation process for determining the amount of a fine to be assessed in administrative penalty situations. Exs. 8 and 9. This process is based on the statutory factors contained in Minn. Stat. § 116.072, subd. 2. The MPCA took into consideration that (1) the Company had no history of significant violations in the past, (2) there was no evidence to show that the violations were willful, (3) the Company did not appear to have saved any money by failing to use enough water.

23. The agency considered one violation to be "high gravity": the failure to adequately wet the ceiling tiles until collected and contained for disposal, in violation of Minn. Rule pt. 7011.9920 and 40 C.F.R. 61.145(c)(6)(i). The second violation, the failure to seal the tiles in leak-tight containers while adequately wet, in violation of Minn. Rule pt. 7011.9920 and 40 C.F.R. 61.150(a)(1)(iii), was considered to be of "moderate gravity." The base penalty for a high-gravity violation for a company with no history of

noncompliance is between \$5,000 and \$7,500. In this case, the agency selected the high end of the range because all of the ceiling tile was dry. An additional \$250 was added to the base penalty for the moderate-gravity violation. The agency determined that the penalty would not be forgiven because of the seriousness of the violations, which occurred in an occupied school building, and because of the large amount of dry material involved.

24. The penalty, and its method of calculation, have been justified and are not unreasonable considering the gravity of the violations.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The MPCA has jurisdiction of the subject matter of this hearing.
2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.
3. The Company violated Minn. Rule pt. 7011.9920, which incorporates by reference the requirements of 40 C.F.R. 61.145 (c)(6)(i) and 40 C.F.R. 61.150(a)(1)(iii), as alleged in the Administrative Penalty Order.
4. The amount of the fine is justified by the gravity of the violations; the agency properly considered the statutory factors in determining the amount of the fine; and the amount of the fine is justified by the statutory factors.
5. The \$7,750 nonforgiveable fine is not unreasonable within the meaning of Minn. Stat. § 116.072, subd. 6(c). That statute prohibits an Administrative Law Judge from recommending a change in the amount of a proposed penalty unless the amount of the penalty is unreasonable.

Based upon the foregoing conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Administrative Penalty Order imposing a \$7,750 nonforgiveable penalty against Quad State Asbestos Removal, Inc. be AFFIRMED in all respects.

Dated this ____ day of May, 1995

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded.

MEMORANDUM

As noted above in the Findings of Fact, Quad State Asbestos Removal, Inc. did not dispute that the violations occurred as alleged in the Administrative Penalty Order. Its employee, Michael Longworth, testified that the ceiling tiles were removed wet, but he did not dispute that the tiles were not kept wet until collected and contained and that some of the dry tile was already in sealed bags. Although Longworth testified that he would have returned and wet down all the tile, including that already in sealed bags, the Agency can properly charge that the violations occurred regardless of Longworth's intent to correct them at a later time.

The amount of the fine is reasonable considering the gravity of the violations. The Agency considers the failure to keep asbestos-containing material adequately wet until collected and contained a high-gravity offense; its reason for choosing the high end of the base penalty range was that all of the tile removed from the ceiling (approximately 325 square feet) was found to be dry. As the Agency concluded, the fact that all of the tile was dry indicates a degree of carelessness that justifies selecting the high end of the penalty range.

To support the amount of the penalty, the Agency offered evidence that similar penalties had been assessed against other companies for similar, but not identical, violations. Loren Bogan argued that the violations found in these other cases were more serious because there dry material was found outside the containment area. Even assuming this is a more serious offense, the evidence at the hearing in this case showed that at least the sealed bags, if not all of the bags of tile, would likely have been removed from the containment area and brought through an occupied area of the school if the violations had not been found when they were by the MPCA inspectors. Based on the evidence, the Agency appears to have treated similar violations in a consistent manner.

Finally, the amount of the penalty cannot be considered unfair in light of the Company's financial performance in 1994. The Agency has offered to make a payment schedule available to the Company to alleviate the hardship of a lump-sum payment, and at the hearing the attorney for the Agency stated that it would continue to make such an option available if the Administrative Penalty Order were affirmed. In any event, the Administrative Law Judge is precluded from tinkering with the amount of the penalty unless it is unreasonable considering the statutory factors (willfulness, gravity, history or past violations, number of violations, economic benefit, and other factors "as justice may require"). Given the gravity of the violations, there is no basis for finding the amount of the penalty unreasonable.